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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

77-5541

CHARLES EDWARD DOWNS, APPELLANT

v.

STATE OF OHIO, APPELLEE

APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

John J. Charles
140 East Main Street
Lancaster, Ohio 43130

G. Gene Jackson
719 West Market Street
Baltimore, Ohio 43105

ATTORNEYS FOR APPELLANT

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No.

CHARLES EDWARD DOWNS,

Appellant,

V.

STATE OF OHIO,

Appellee.

On Appeal From the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The Memorandum Decision of the Supreme Court of Ohio is reported at 51 Ohio St. 2d 47 (1977) and appears herein as Appendix A. The Judgment Entry of the Supreme Court of Ohio appears as Appendix B.

JURISDICTION

Appellant appeals from a judgment of the Supreme Court of Ohio, which affirmed appellant's conviction for three counts of aggravated murder and upheld the death sentence imposed on the appellant by the trial court.

Appellant contends that Sections 2929.03 and 2929.04 of the Ohio Revised Code, Ohio's statutory procedure for imposing the death penalty, is invalid because it is repugnant to the Fourteenth Amendment to the Constitution of the United States. The Ohio Supreme Court has upheld the validity of these statutes.

The judgment of the Supreme Court of Ohio sought to be reviewed was entered on July 13, 1977. The Notice of Appeal

was filed on October 3, 1977, in the Supreme Court of Ohio, the court possessed of the record. A copy of the Notice of Appeal appears herein as Appendix C.

Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257 (2).

The validity of Sections 2929.03, imposing sentence for a capital offense, and 2929.04, criteria for imposing death or imprisonment for a capital offense, is here involved. These statutes are found in Page's Ohio Revised Code (1975) at pages 153 and 154. The full text of the two statutes appear herein as Appendixes D and E respectively.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Do Sections 2929.03 and 2929.04 of the Ohio Revised Code, requiring a defendant convicted of aggravated murder to prove certain mitigating circumstances by a preponderance of the evidence in order to be sentenced to life imprisonment, rather than to death, violate the due process requirement of the Fourteenth Amendment to the Constitution of the United States?

2. Must an indigent defendant be permitted to retain the services of a psychiatrist of his choosing at public expense, when the defendant has raised the issue of mental capacity as a mitigating circumstance pursuant to Ohio's statutory procedure for imposing the death penalty?

STATEMENT OF FACTS

Charles Edward Downs, the appellant herein, was tried for three (3) counts of aggravated murder. After the jury returned a verdict of guilty on all three (3) counts, the trial court had the appellant examined at the local mental health clinic and, after a mitigation hearing, sentenced the defendant to death.

The sentencing phase of the case was conducted pursuant to Ohio Revised Code Sections 2929.03 and 2929.04, which provide that the death penalty will be imposed unless the existence of specific mitigating circumstances are shown to

exist by a preponderance of the evidence.

Appellant contended that his offense was the product of psychosis or mental deficiency, one of the mitigating circumstances listed in Section 2929.04 of the Ohio Revised Code. After counsel for appellant had reviewed the complex reports by the psychiatrist and psychologists, who had examined appellant at the trial court's direction, appellant moved the court to authorize him to employ a psychiatrist of his own choosing at the expense of the State of Ohio and to furnish defendant with a transcript of the trial, also at State expense, for use by that psychiatrist, the defendant being indigent. Upon hearing, the defendant's motion was overruled by the Court. The texts of appellant's motion and the trial court's entry overruling the motion appear herein as Appendixes F and G.

At the sentencing hearing, Mr. Downs, pursuant to Section 2929.04 (B), was required to carry the burden of proof by a preponderance of the evidence on the issue of mitigation. The only testimony available to appellant to prove the existence of psychosis or mental deficiency was that of the psychologists and the psychiatrist appointed by the Court. There was conflict between the testimony of the psychiatrist and the psychologists. The psychologist testified that Mr. Downs, under stress, tended to be psychotic (TR 7 at 13), and that he could differentiate right from wrong only in the abstract sense. (Tr 7 at 38) The psychiatrist stated that he found no psychosis. (TR 7 at 58)

The Court of Appeals, Fifth Appellate District, affirmed the conviction and upheld the imposition the death penalty. Appellant then appealed to the Supreme Court of Ohio. In that appeal, appellant, as he had in the Court of Appeals specifically argued the two questions which are presented by this appeal. Appellant contended that Sections 2929.03 and 2929.04 of the Ohio Revised Code, Ohio's statutory procedure for imposing the death penalty, violated his right

of due process under the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of Ohio found appellant's challenge to the constitutionality of Ohio's death penalty statutes to be without merit and affirmed the judgment of the lower courts. The Supreme Court of Ohio is the highest court in the State of Ohio.

The appellant is confined in the Southern Ohio Correctional Facility, Lucasville, Ohio. Execution of the death sentence has been stayed by the Supreme Court of Ohio pending this appeal.

SUBSTANTIAL FEDERAL QUESTION

The questions presented on this appeal must be passed upon by this Court, because they involve unresolved conflicts between Ohio's statutory procedure for imposing the death penalty and the due process rights of the appellant under the Fourteenth Amendment of the United States Constitution.

I.

This appeal raised the question whether Section 2929.03 and 2929.04 of the Ohio Revised Code, requiring a defendant convicted of aggravated murder to prove certain mitigating circumstances by a preponderance of the evidence in order to be sentenced to life imprisonment, rather than to death, violates the due process requirement of the Fourteenth Amendment to the United States Constitution. It is appellant's contention that the prosecution must prove beyond a reasonable doubt the absence of mitigating circumstances when the issue has been raised.

The Supreme Court of Ohio, in affirming the death sentence imposed on appellant, states in paragraph one of its syllabus, that Ohio's sentencing procedure for a capital offense is "not an adversary proceeding" because under the provisions of Ohio Revised Code Sections 2929.03 (D) and (E) and 2929.04 (B) "neither the defendant nor the prosecution is required by the statute to offer testimony or other evidence of mitigating circumstances."

The illogic of this proposition is obvious. Section 2929.04 specifically states that the death penalty is precluded when one of the mitigating circumstances is established by a preponderance of the evidence. If the defendant offers no evidence, no mitigating circumstances can possibly be established. So the defendant clearly not only has the burden of proving the existence of mitigating circumstances by a preponderance of the evidence, but also has the burden of going forward with the evidence. Once the defendant offers evidence, the prosecution will attempt to rebut that evidence. For the Supreme Court of Ohio to say that this does not create an adversary proceeding is ludicrous.

In paragraph five of its syllabus the Court does concede that the appellant did bear the "risk of nonpersuasion" during the mitigation hearing, but goes on to state that this sentencing procedure "does not impose an unconstitutional burden upon a defendant which would render the Ohio Statutory framework for the imposition of capital punishment unconstitutional."

The Supreme Court of Ohio goes on to say in paragraph six of its syllabus that the issue of mitigation is not "an additional and constitutionally mandated element of a capital offense, and the state is not constitutionally required to prove the lack of such mitigating factors beyond a reasonable doubt."

The Supreme Court of Ohio had stated in two earlier cases involving Ohio's aggravated murder statutes that the defendant had the burden of proof by a preponderance of the evidence to establish mitigating circumstances. The Court overruled those prior opinions, apparently believing that by calling the death penalty sentencing procedure a "nonadversary proceeding" and by calling the burden of proof the "risk of nonpersuasion" the due process requirements of the Fourteenth Amendment of the Constitution of the United States and the impact of Mullaney vs. Wilbur (1975) 421 U. S. 684, could be avoided by the Ohio courts in imposing the death penalty.

The Supreme Court of Ohio in its opinion in this case

does, in fact, recognize the impact of Mullaney on Ohio's procedure for imposing the death penalty, to wit:

It can be argued that the rationale of Mullaney is applicable to Ohio's death sentencing procedure. The mitigating factors listed in R. C. 2929.04 (B) are relevant in determining the degree of punishment attached to the commission of the offense. As was true with the issue of provocation in Mullaney, these factors do not constitute elements of the crime. As was the case in both Winship and Mullaney, the defendant in the case at hand has at stake interest of immense importance.

It is true that the state would be required to bear an additional burden in a capital case. But neither that fact, nor the fact that the evidence may be peculiarly within the knowledge of the defendant is of any consequence. Of Mullaney, at page 702. State vs. Downs (1977), 51 Ohio St. 47 at 57.

The Court then proceeds to distinguish the issue of provocation in homicide in Mullaney from mitigation in death sentences by aluding to historical dissimilarities between the two issues. This approach, however, ignores the general thrust of Mullaney and does not recognize the significant role of the mitigation hearing in the Ohio procedure for imposing the death penalty.

In Mullaney this Court unanimously struck down a Maine statute which required a defendant charged with murder to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter and to receive a lesser penalty. The Court said that its holding in In Re Winship, 397, U. S. 358 (1970), that the prosecution must prove beyond a reasonable doubt every fact necessary to prosecute the crime charged, was not satisfied by the Maine statute. The Court in rendering its decision in Mullaney stated:

....The criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blameworthy," State v. Lafferty, 309 A2d, at 671, 673 (concurring opinion), they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in Winship.

The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

This Court in Mullaney rejected the argument that In Re Winship did not apply because the absence of provocation was not an element of the crime, but only relative to the determination of punishment. The Court said:

Moreover, if Winship were limited to those facts that constitute a crime as defined by state law, a State could undetermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes. Characterizing them as factors that bear solely on the extent of punishment.

Section 2929.04 (B) of the Ohio Revised Code is identical in general concept to the Maine statute struck down in Mullaney. The Ohio statute states:

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [preponderance] of the evidence:

- (1) The victim of the offense induced or facilitated it.
- (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
- (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The Ohio statute creates the distinction between the crime of aggravated murder requiring imposition of the death penalty and the crime of aggravated murder in which the death penalty is precluded. The distinction created different offenses, not different degrees of a single offense. The distinction is extremely significant because it involves life or death.

One of the mitigating circumstance which the offender under the Ohio statute must prove by a preponderance of the evidence is provocation. Section 2929.04 (B) (2). It was the requirement in Maine statute that the offender prove provocation that caused the Maine law to be declared unconstitutional in Mullaney.

The Maine law and Ohio law are quite similar. The Ohio law, like the Maine law, is unconstitutional, because it requires the defendant to prove mitigating circumstances by a preponderance of the evidence to preclude imposition of the death penalty. In doing so, it violates the due process requirements of the Fourteenth Amendment of the United States Constitution and is contrary to the holdings of this Court in Mullaney and In Re Winship.

The Ohio court's view that the rulings and reasoning of In Re Winship, supra, and Mullaney vs. Wilbur, supra, do not extend to the mitigation hearing denies appellant fundamental due process, because the sentencing phase is an integral part of the determination of the nature of the crime, and ultimately, whether or not the Court will impose the death penalty. To circumvent due process requirements by the procedural ploy of saying that such requirements do not apply to one half of a bifurcated trial is clearly contrary to the spirit and reasoning of In Re Winship, supra, and Mullaney vs. Wilbur, supra. The determination of the absence or presence of mitigating circumstances is an element of the crime itself and not solely a matter of sentencing. The argument that the showing of mitigating circumstances is solely a factor relevant to sentencing and to punishment, was rejected in Mullaney vs. Wilbur, supra.

II.

The second question is whether an indigent defendant must be permitted to retain the services of a psychiatrist of his choosing at public expense, when the defendant has raised the issue of mental capacity as a mitigating circumstance pursuant to Ohio's statutory procedure for imposing the death

penalty.

The appellant, Charles Edward Downs, was not only required to prove the existence of mitigating circumstances to preclude imposition of the death penalty, but he was not permitted, despite his indigency, to obtain the services of a psychiatrist of his choosing at public expense to assist him and his counsel at the mitigation hearing.

After the appellant's conviction for aggravated murder, the Court ordered that Mr. Downs be examined by the local mental health clinic. The reports furnished to the court by the psychiatrist and the psychologists at the clinic were of such complexity and so contradicted one another that appellant requested an independent examination by a psychiatrist of appellant's choosing at the expense of the State of Ohio. That request was overruled.

The importance of an independent evaluation was underscored at the mitigation hearing. Two (2) psychologists and the psychiatrist all acknowledged that they relied entirely on interviews with the defendant for their evaluation. They did not talk to Mr. Down's friends, family or employers or to witnesses who had testified about Mr. Downs at the trial. They did not read the transcript of the trial, nor did they look into Mr. Down's background.

At the mitigation hearing, there was a conflict between the testimony of the psychologists and that of the psychiatrist. The psychologists testified that Mr. Downs, under stress, tended toward the psychotic and that he could differentiate right from wrong only in a very abstract sense. The psychiatrist stated that he found no psychosis. The trial court then ruled that the appellant had failed to establish the existence of psychosis.

The appellant had been required to prove the existence of psychosis or mental deficiency, but the only experts made available to him were those selected by the Court and directed by the Court in their evaluation of the defendant. A defendant

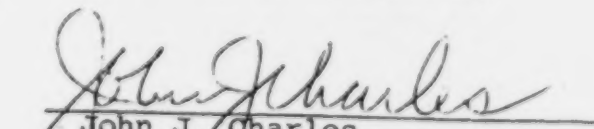
with financial resources would unquestionable have obtained the assistance of a psychiatric expert of his choosing. Had this appellant chosen to raise the defense of insanity at the trial, the court would have permitted him to employ a psychiatrist of his choosing at public expense. The court apparently draws a distinction between the question of guilt and innocence and the question of life or death. To the appellant, and to a society which places a high regard on a human life, the latter may well be the more important determination.

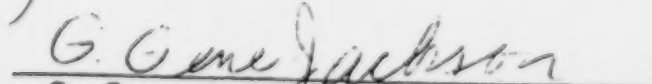
Giedon vs. Wainwright, 372 U. S. 335 (1967) began a fastmoving trend in the criminal justice system of the United States to put the indigent defendant on an equal footing with a defendant who can pay for his defense. There can be no doubt that a defendant with financial resources would employ experts to assist him and his counsel in a mitigation hearing. Mr. Downs, because he was indigent, has been denied that opportunity at the most crucial stage of the proceedings, the determination of whether he lives or dies. The trial court's refusal to appoint a psychiatrist to assist appellant and his counsel denied appellant his fundamental right of due process.

CONCLUSION

This appeal raises issues of extreme significance to the criminal justice system. This court has upheld the right of the States to impose the death penalty, but only under circumstances which guarantee that all the due process rights of the individual defendant are protected completely. Ohio's statutory scheme for imposing the death penalty impugns those fundamental rights of due process. This Court has not decided the issues raised by this appeal and should consider them at this time.

Respectfully, submitted,


John J. Charles
Attorney for Appellant


G. Gene Jackson
Attorney for Appellant

APPENDIX A, is the Opinion of the Court in State v. Downs, (1977), 51 Ohio St.2d 47., and has not been reproduced here.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, }
City of Columbus. }

19⁷⁷ TERM

To wit: July 13, 1977

The State of Ohio,
Appellee,

vs.

Charles Edward Downs,
Appellant.

No. 77-75

APPEAL FROM THE COURT OF
APPEALS

for FAIRFIELD County

This cause, here on appeal from the Court of Appeals for FAIRFIELD County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 12th day of September, 1977 as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Fairfield County,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for FAIRFIELD County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this day of 19

Clerk

Deputy

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OHIO

CHARLES EDWARD DOWNS,

Appellant,

v.

STATE OF OHIO.

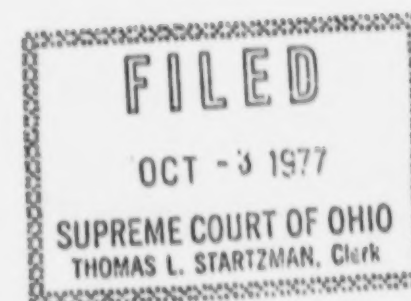
No. 77-75

NOTICE OF APPEAL TO THE SUPREME COURT OF
THE UNITED STATES

Notice is hereby given that Charles Edward Downs, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Ohio affirming the judgment of conviction, entered herein on July 13, 1977.

This appeal is taken pursuant to 28 U.S.C.

§1257(2).



John J. Charles
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140 East Main Street
Lancaster, Ohio 43130

G. Gene Jackson
JACKSON & KELLER
719 West Market Street
Baltimore, Ohio 43105

ATTORNEYS FOR APPELLANT

PROOF OF SERVICE

A copy of the foregoing Notice of Appeal to the Supreme Court of the United States was served on James W. Luse, Prosecuting Attorney of Fairfield County, Ohio, by personally delivering a copy to his office in the Equitable Building, Lancaster, Ohio 43130, this 3rd day of October, 1977.

John J. Charles

G. Gene Jackson

Attorneys for Appellant

APPENDIX D

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-

examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v. H 511. EN 1-1-74.

BEST COPY AVAILABLE

APPENDIX E

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

HISTORY: 134 v. H.S. 11. EN 1-1-74.

APPENDIX F

IN THE COURT OF COMMON PLEAS OF FAIRFIELD COUNTY, OHIO

State of Ohio,

FILED

Plaintiff, JAN 2 10 57 AM '76

Case No. 7306

-VS-

Charles Edward Downs,

ROBERT W. LACEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

NOTION

Defendant.

The defendant, by his counsel, represents to the Court that the Psychiatric report of Dr. Harold T. Brown, furnished herein, is of such complexity and the issue to be resolved thereby is of such great consequence to the defendant, that the defendant cannot intelligently proceed with mitigation hearing prior to sentence as required by Section 2929.03 Ohio Revised Code, without additional psychiatric evaluation and information which are unavailable to defendant by reason of his indigency.

Defendant therefore respectfully moves the Court as follows:

Branch I. That defendant be authorized to employ a psychiatrist of his own choosing and at the expense of the State of Ohio, to make an independent psychiatric examination and evaluation of defendant upon such terms as the Court may require in order that the information therefrom be available to defendant and to the Court prior to the hearing herein scheduled for 8:30 A.M. on January 22, 1976.

Branch II. That defendant be furnished a transcript of the testimony adduced against him at the trial of this case in order that he, his counsel, and a psychiatrist of his choosing may evaluate it as it might have bearing upon the issue of mitigation and the penalty to be imposed herein; that such transcript be furnished defendant sufficiently prior to such hearing as to permit use and analysis thereof in preparation for such hearing.

Branch III. That the Court vacate and set aside the hearing date set
herein for 8:30 A.M. on January 22, 1976 to the extent to prepare for
such hearing by obtaining the transcript and psychiatric report heretofore
requested.

Respectfully submitted,

John J. Charles
DANGER, JOHNSTON & COLEMAN
Attorney for Defendant

G. Gene Jackson
JACKSON & KELLER
Attorney for Defendant

PROOF OF SERVICE

A copy of the foregoing Motion was mailed by regular U. S. Mail to James
Luse, Assistant Prosecuting Attorney, Equitable Building, Lancaster, Ohio,
43130, this ____ day of January, 1976.

G. Gene Jackson
JACKSON & KELLER
Attorney for Defendant

APPENDIX G

IN THE COURT OF COMMON PLEAS, FAIRFIELD COUNTY, OHIO

The State of Ohio,

vs.

CASE NO. 7605

Charles Edward Downs,

ENTRY

Defendant

On this 9th day of January, 1976, appeared James
W. Luse, Prosecuting Attorney of Fairfield County, Ohio, on
behalf of the State of Ohio; also appeared the Defendant,
Charles Edward Downs, with his counsel, G. Gene Jackson and
John J. Charles.

The Defendant, having filed a motion with the
Court to authorize the Defendant to employ a psychiatrist of
his own choice and to provide him with a transcript of the trial
and to vacate and set aside the hearing for mitigation set
for 8:30 a.m. on January 22, 1976. The Court, after hearing
oral arguments of counsel finds each of the three branches of the
Defendant's motion to be not well taken and the same are
hereby overruled.

MERLIN C. PARENT--JUDGE

APPROVED BY:

James W. Luse
Prosecuting Attorney

G. Gene Jackson
Counsel for Defendant

John J. Charles
Counsel for Defendant

77-5541

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE STATE OF OHIO

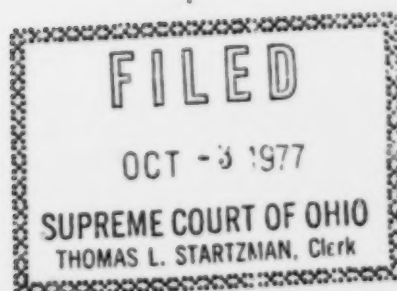
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STATE OF OHIO.)

No. 77-75

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of conviction, entered herein on July 13, 1977.

This appeal is taken pursuant to 28 U.S.C.
§1257(2).



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PROOF OF SERVICE

A copy of the foregoing Notice of Appeal to the
Supreme Court of the United States was served on James W.
Luse, Prosecuting Attorney of Fairfield County, Ohio, by
personally delivering a copy to his office in the Equitable
Building, Lancaster, Ohio 43130, this 3rd day of October,
1977.

John J. Charles

G. Gene Jackson

Attorneys for Appellant

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

CHARLES EDWARD DOWNS,

*

APPELLANT-PETITIONER,

*

vs.

*

CASE NO. 77-5541

THE STATE OF OHIO,

*

APPELLEE-RESPONDENT.

*

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION

James W. Luse
Prosecuting Attorney
Fairfield County, Ohio
Room 314
Equitable Building
Lancaster, Ohio 43130

ATTORNEY FOR APPELLEE

(614) 653-4256

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<u>Mullaney vs. Wilbur</u> , 421 U. S. 684 (1975)	4, 5, 6, 9
<u>In Re Winship</u> , 397 U. S. 358 (1970)	5, 9
<u>Proffitt vs. Florida</u> , (1976), 428 U. S. 242, 49 L. Ed., Section 913	6, 9, 10
<u>Gideon vs. Wainwright</u> ,	13

STATUTES:

Ohio Revised Code	
Section 2929.03	1, 2, 4, 6, 7, 11, 13
Section 2929.04	1, 2, 4, 8, 11

CONSTITUTIONAL PROVISIONS:

Constitution of the United States	
Fourteenth Amendment.	3, 4, 5, 6, 7

STATEMENT OF THE CASE

The Defendant, Charles Edward Downs, the Appellant herein, was tried before a jury upon three (3) counts of aggravated murder in violation of Section 2903.01 (A) of the Ohio Revised Code with aggravating circumstances delineated as specifications for the imposition of the death penalty as provided by Section 2929.04 (A) (5) of the Ohio Revised Code. The prosecution presented 32 witnesses to prove the defendant's guilty beyond a reasonable doubt during the course of a two week trial. The jury returned a verdict of guilty against the defendant of three (3) counts of aggravated murder in violation of Section 2903.01 (A) of the Ohio Revised Code and a separate verdict of guilty of a specification as to each count in violation of Section 2929.04 (A) (5) of the Ohio Revised Code. An accurate detailed statement of the facts concerning the commission of these three crimes is contained in the decision rendered by the Supreme Court of Ohio affirming these convictions found in State vs. Downs, 51 Ohio St. 47 (1977).

Section 2923.03 of the Ohio Revised Code outlines the procedure for the imposition of sentence for capital offenses. This section of the code states that once a verdict of guilty has been returned against the defendant in a trial by jury both upon the charges of aggravated murder and one or more specifications, the trial judge shall conduct a mitigation hearing. Section 2929.03 (D) of the Ohio Revised Code requires that the trial judge shall have a pre-sentence investigation prepared and a psychiatric examination to be made of the defendant. The Court then shall hear testimony and other evidence, including the statement, if any, of the offender, and arguments of counsel relevant to the penalty which should be imposed upon the offender.

Under Section 2929.03 (E), the Court shall determine, based upon the reports, testimony and any other evidence, including the statement of the offender and arguments of counsel, whether any

of the mitigating circumstances listed in Division (B) of Section 2929.04 of the Ohio Revised Code are established by a preponderance of the evidence. If any mitigating circumstances are established by a preponderance of the evidence, the defendant shall be sentenced to life imprisonment. If none of the mitigating circumstances are established by preponderance of the evidence, the Court shall impose a sentence of death on the offender.

The mitigating circumstance alleged by this defendant is contained in Section 2929.04 (B) (3) of the Ohio Revised Code, which provides that it is a mitigating circumstance if the offense was primarily a product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

It is to be noted that under Section 2929.03 (D) (E) of the Ohio Revised Code, it is the Court which has the duty to have prepared the pre-sentence report and to have the defendant examined by a psychiatrist. The state did not move to have the defendant examined by its own psychiatrist. The psychiatrist who testified to enable the Court to determine the proper penalty in this case was the Court's witness. The fact that this procedure was followed in this case is indicated in an entry filed on November 12, 1975, a copy of which is attached, and marked as Appendix A.

The Appellant herein, alleges in its statement of the case that the defendant was required to carry the burden of proof by preponderance of the evidence on the issue of mitigation. There is nothing in the record or in the statutory provisions under the Ohio Revised Code in Section 2929.03 (D) and (E) which makes any reference to either party having the burden of proof by a preponderance of the evidence upon the issue of mitigation. The mitigation hearing is not an adversary hearing. Therefore, Sections 2929.03 and 2929.04 of the Ohio Revised Code, Ohio's statutory procedure for imposing the death penalty, do not place

an unconstitutional burden of proof upon the defendant and do not violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

QUESTION OF LAW NO. ONE

SECTION 2929.03 (E) OF THE OHIO REVISED CODE REQUIRING THE COURT TO FIND A MITIGATING CIRCUMSTANCE LISTED IN SECTION 2929.04 (B) OF THE OHIO REVISED CODE TO BE ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE AFTER A DEFENDANT HAS BEEN CONVICTED OF AGGRAVATED MURDER WITH AGGRAVATED SPECIFICATIONS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Supreme Court of Ohio, in affirming the death sentence imposed upon Appellant, states in paragraph one of its syllabus, that Ohio's sentencing procedure for a capital offense is "not an adversary proceeding" because under provisions of the Ohio Revised Code Sections 2929.03 (D) and (E) and 2929.04 (B), neither the defendant nor the prosecution is required by these sections of the code to offer testimony or other evidence of a mitigating circumstance.

The Appellant then states that this is illogical since if the defendant presented no evidence, no mitigating circumstances could possibly be established. This clearly is not what Section 2929.03 (E) of the Ohio Revised Code indicates is the law in Ohio. The Court based upon the pre-sentence report required by this section of the code and the psychiatric examination of the defendant could easily find the existence of a mitigating circumstance had been established by a preponderance of the evidence without either side presenting any evidence. Even the statement of the defendant could be sufficient for the Court to find proof by preponderance of the evidence of the existence of a mitigating circumstance. The mitigation hearing is not an adversary proceeding but merely a hearing for the Court to determine the appropriate penalty under the law.

The Appellant relies primarily on Mullaney vs. Wilbur, 421 U. S. 684 (1975), to support his first Proposition of Law that Ohio Statutory scheme as outlined in Sections 2929.03 and 2929.04 of the Ohio Revised Code violates the due process requirements of the Fourteenth Amendment of the Constitution of the United States. It is Appellee's position that Mullaney, supra, is not applicable

to the case at bar.

In Mullaney, the Supreme Court of the United States struck down a Maine statute which required a Defendant charged with murder to prove by preponderance the evidence that he acted in a heat of passion on sudden provocation in order to reduce a murder charge to manslaughter in order to receive a lesser penalty. Under the Maine statute, it was only necessary for the state in a homicide case to prove that there was a felonious homicide and that the homicide was unlawful and that it was intentional. Malice aforethought was allowed to be presumed, if the first two elements were proved, unless the Defendant proved by preponderance of the evidence that he acted in the heat of passion on sudden provocation.

The Supreme Court in that decision held that the statute was unconstitutional because it was necessary for the state to prove beyond a reasonable doubt all of the "elements" of the offense of murder and that an essential element of murder was malice. The Court reasoned that to allow malice to be presumed and requiring the defendant to prove lack of malice by a preponderance of the evidence, the State in effect was shifting the burden of proving the guilt of the defendant on an essential element, malice, from the state to the defendant, which violated the due process clause of the United States Constitution.

The Supreme Court held that in order to sustain a conviction for murder in Maine, as in all cases, the state must prove each and every "element" of that offense, to-wit; murder, beyond a reasonable doubt. The Court held that malice was an essential element which the state must prove beyond a reasonable doubt. This is in conformity with the courts previous holding In Re Winship, 397 U. S. 358 (1970), wherein the Court held that in juvenile cases, it would still be necessary under the due process clause of the Fourteenth Amendment of the United States Constitution that a finding of guilty in a juvenile case could only be based upon proof beyond a reasonable doubt and not by a preponderance of the evidence.

The decision in Mullaney, supra, did not turn upon the penalty which followed the conviction, but only upon requiring the state to prove an essential element of the crime murder beyond a reasonable doubt. The issue of provocation in a homicide case and mitigation hearings in capital cases are historically dissimilar. The Supreme Court noted in Mullaney, supra, that the decision was not to be interpreted as casting doubt upon the discretion of trial judges to impose varying sentences for the commission of the same crime and that proof beyond a reasonable doubt of those factors considered by the judge in making his decision as to the appropriate sentence was not required by Mullaney, supra, at page 697, fn. 23, C, also, Proffitt vs. Florida (1976), 428 U. S. 242, 49 L. Ed., Second 913.

The Supreme Court of Ohio in interpreting Division (B) of Section 2929.04 of the Ohio Revised Code, which required a mitigating circumstance to be established by a preponderance of the evidence, held that the lack of mitigating circumstances was not an additional constitutionally mandated element of a capital offense, and that the state was not constitutionally required to prove the lack of such mitigating circumstances beyond a reasonable doubt.

The State has met all constitutional mandates required by the Fourteenth Amendment of the Constitution of the United States under Ohio Revised Code Section 2929.03 (B) of the Ohio Revised Code, when, the state has proven the defendant's guilt beyond a reasonable doubt of aggravated murder and guilt beyond a reasonable doubt of the aggravated circumstances.

The death penalty is precluded if one or more mitigating circumstances is established or preponderance as outlined by Section 2929.03 (B) of the Ohio Revised Code, which reads as follows:

"(B) Regardless of whether one or more of aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and

circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

- (1) The victim of the offense induced or facilitated it.
- (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
- (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." (Emphasis added.)

The determination of the absence or presence of mitigating circumstances is not an element of the crime itself. It is merely a matter of sentencing.

The Appellant urges that even if the state is not required to prove lack of mitigating circumstances beyond a reasonable doubt as an element of a capital offense, placing the burden upon the defendant to prove a mitigating circumstance violates the due process requirements of the Fourteenth Amendment of the United States Constitution.

The Supreme Court of Ohio, in syllabus five of the Court's decision, answered this question when the Court held that Ohio Revised Code Section 2929.03 (E), which requires that a mitigating circumstance be established by a preponderance of the evidence, did not impose an unconstitutional burden upon the defendant which would render the Ohio Statutory frame work for the imposition of capital punishment unconstitutional. The Ohio Supreme Court held that Section 2929.03 (E) of the Ohio Revised Code placed no burden upon the defendant but only required that the defendant bear the risk of nonpersuasion during the mitigation hearing.

The duty of deciding whether the penalty shall be life imprisonment or death under Ohio law falls upon the trial judge if there has been a jury verdict of guilty of aggravated murder and guilty of one of the aggravated specifications. The relevant Code Section is 2929.03 (C), (D), and (E) of the Ohio Revised Code, which states:

"(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of

aggravating circumstances listed in Division (A) of Section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or specifications listed in Division (A) of such section, then following a verdict of guilty of both the charge and one or more specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by a jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The Court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to Division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender." (Emphasis added.)

Under Ohio law, it is the Court who gets the pre-sentence investigation, orders the psychiatric examination, listens to the arguments of counsel, and to the defendant, if he desires to make a statement, and determines what penalty should be in a capital case. It should be noted the last sentence of paragraph (B) of Section 2929.04 which outlines the mitigating circumstances states that if one or more of them is established by a preponderance of the evidence, then the death penalty is precluded.

This section of the code does not say that the Defendant must prove any of the mitigating circumstances by preponderance of the evidence, but rather that the court must determine based upon all evidence that is adduced at the mitigation hearing, whether any

of the mitigating circumstances is established by a preponderance of the evidence.

The Court upon consideration of reports, testimony, and any other evidence, including the statement of the offender and arguments of counsel, then determines whether it has been established by a preponderance of the evidence whether or not one of the mitigating circumstances exists in the case. There is no requirement upon the defendant to prove anything.

The Court could very well find from the reports, the testimony at the trial itself, the pre-sentence report, the psychiatric examination and report, or the arguments of counsel, that a mitigating circumstance had been established by a preponderance of the evidence, without the defendant presenting any evidence or without the state presenting any evidence. Likewise, the Court could find that no mitigating circumstance had been established by a preponderance of the evidence, without either the state or the defendant presenting any evidence.

In Re Winship, supra, and Mullaney vs. Wilbur, supra, dealt with the guilt phase rather than the sentencing phase of a case. The Appellant has cited no case in which the United States Supreme Court has held that the lack of a mitigating circumstance was an additional, constitutionally mandated element of a capital offense. The due process clause of the United States Constitution does not require proof beyond a reasonable doubt of any factors a Court might consider at the sentencing phase of a case.

In Proffitt, supra, at pages 248-250, the Supreme Court of the United States approved the Florida statutory scheme for sentencing, which provided for a separate evidentiary hearing to be held before the trial judge and jury to determine the sentence in a capital case. The Florida statute provided that evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Although Ohio's capital sentencing procedure differs somewhat from the procedure approved

by the United States Supreme Court in Proffitt, the Appellee would urge that the differences are not of constitutional significance.

QUESTION OF LAW NO. TWO

WHEN A DEFENDANT HAS RAISED THE ISSUE OF MENTAL CAPACITY AS A MITIGATING CIRCUMSTANCE PURSUANT TO SECTION 2929.04 (B) (3) OF THE OHIO REVISED CODE, THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE COURT APPOINT AN ADDITIONAL PSYCHIATRIST OF THE DEFENDANT'S CHOOSING AT STATE EXPENSE AFTER THE COURT HAS ALREADY APPOINTED A PSYCHIATRIST AND A PSYCHOLOGIST UNDER PROVISIONS OF OHIO REVISED CODE SECTION 2929.03 (D) AND PURSUANT TO OHIO REVISED CODE SECTION 2947.06.

Again the Defendant-Appellant insists that the burden of proof was on him to show psychosis or mental deficiency as a mitigating circumstance under Section 2929.04 (B) (3) of the Ohio Revised Code. The Appellee would respectfully submit that Defendant-Appellant is not required to prove the existence of psychosis or mental deficiency as a mitigating circumstance.

Section 2929.03 (D) provides that when the death penalty may be imposed, the Court shall require a pre-sentence investigation and a psychiatric examination to be made of the defendant. Copies of such report should be furnished to the prosecutor and to the offender or his counsel.

The Appellant argues that the only experts made available to him were those selected by the Court and directed by the Court in their evaluation of the defendant. This is true, but this is exactly what Revised Code Section 2929.03 (E) of the Ohio Revised Code requires. The psychiatrist and psychologists who testified at the mitigation hearing were the Court's witnesses and not the State's or the defendant's.

A mitigation hearing was had on January 22, 1976, before the Honorable Merlin C. Parent, Judge of the Common Pleas Court of Fairfield County, Ohio, at which time two psychologists and one psychiatrist testified concerning the mental status of the Defendant-Appellant herein. Dr. Harold T. Brown, the only psychiatrist who testified at the hearing, stated that he had received a letter from Judge Parent concerning the facts in this case and that the Court was requesting a psychiatric examination. A copy of this letter is marked Appellee's Appendix B and attached hereto.

It is the Appellee's contention that this letter definitely establishes the Appellee's point that the two psychologists and the psychiatrist were the Court's witnesses and were performing the examination for the Court's determination of the appropriate sentence in this case. Both the State and the Defendant had access to the reports and an opportunity to cross-examine the psychiatrist and the psychologists at the mitigation hearing. The State did not hire it's own psychiatrist in an attempt to gain some forensic advantage.

Dr. Harold T. Brown testified at the mitigation hearing that in his opinion the defendant was a passive-aggressive personality. Dr. Brown further stated that the Defendant did have a concept between right and wrong and that he knew it was wrong to kill somebody (TR 7, page 58). A passive-aggressive personality as described by Dr. Brown is evidenced by a person who is immature, anti-authority, dependent, who resents that dependence, reacts passively to authority, and is very pleasure oriented. In addition, Dr. Brown indicated that a passive-aggressive personality disorder is not a psychosis, (TR 7, page 58). A question was asked Dr. Brown whether the defendant in this case suffered from a mental deficiency to which he replied, "No." (TR 7, page 60) The Defendant was not retarded according to Dr. Brown. (TR 7, page 60)

Finally, counsel for the State put forth a hypothetical question to Dr. Brown outlining in detail all the essential facts of how the triple aggravated murder occurred as established by the evidence at the trial. Then Dr. Brown was asked to assume all these facts to be true and then to give his opinion, if such an offense as described to him had been done by the defendant, would such an offense have been primarily the product of a psychosis or a mental deficiency that the defendant had. Dr. Brown responded, "No, I would not see any indication of psychosis or deficiency in any of that." (TR 7, page 61 through 63). Dr. Brown was finally asked whether a passive-aggressive personality as he had diagnosed

in the defendant had the ability to control his conduct if he so choses. Dr. Brown responded, "I think they do." (TR 7, page 69).

The Court based upon reports it had received, the testimony of two psychologists and a psychiatrist and the arguments of counsel, found that no mitigating circumstance had been established by a preponderance of the evidence and imposed the death penalty. The procedures followed were conducted in accordance with the law in the State of Ohio as outlined in Section 2929.03 of the Ohio Revised Code.

The Appellant cites the case of Gideon vs. Wainwright, 372 U. S. 335, (1967) in support of his contention that the defendant should have been able to hire his own psychiatrist in this particular case to assist him to prove the mitigating circumstance of psychosis or mental deficiency. Gideon vs. Wainwright, supra, held that under the Sixth Amendment in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel. The Defendant in this case had two able counsel appointed for him, so the requirements of Gideon, supra, have been met. The Appellant cites no case to support his proposition that he is entitled to have his own psychiatrist appointed under circumstances appropriate in this case.

Even in the case of the right to counsel, as required by Gideon, supra, the defendant is not entitled to the appointment of counsel of his choice. See notation, Indigent Accused Right to Choose Particular Counsel Appointed to Assist Him, 66ALR 3rd 996, Section 3.

When the Court holds a mitigation hearing under provisions of Revised Code Section 2929.03 (D) of the Ohio Revised Code, having appointed a psychiatrist and a psychologist pursuant to Ohio Revised Code 2947.06, it is not constitutionally required to appoint an additional psychiatrist of the defendant's choosing at the state's expense.

CONCLUSION

It is respectfully submitted that the conviction of the defendant and imposition of the death penalty were in all respects legal and proper under the law of the State of Ohio and the Constitution of the United States and that therefore certiorari to the United States Supreme Court should not be granted.

Respectfully submitted,

James W. Luse
James W. Luse
Prosecuting Attorney
Fairfield County, Ohio

APPELLEE'S APPENDIX "A"

IN THE COURT OF COMMON PLEAS, FAIRFIELD COUNTY, OHIO

The State of Ohio,

vs.

Charles Edward Lewis,

Defendant.

On this 21st day of October, 1975, appeared John D. Martin, Prosecuting Attorney of Fairfield County, Ohio, and James W. Luse, Assistant Prosecuting Attorney of Fairfield County, Ohio, on behalf of the State of Ohio; also appeared the defendant, Charles Edward Lewis, with his counsel, G. Gene Jackson and John J. Charles.

The defendant was heretofore indicted by the Grand Jury of Fairfield County, Ohio, during the May Term, 1975, charging him with three counts of aggravated murder, in violation of Section 2903.01 of the Ohio Revised Code, with specification in all three counts in violation of Section 2903.04 () subsection (5) of the Ohio Revised Code.

On the 21st day of October, 1975, an arraignment was held upon the indictment at which time the defendant appeared with his counsel, John J. Charles. The defendant acknowledged that he had received a copy of the indictment on August 15, 1975, and signed an acknowledgment that he received the indictment, which was accepted by the Court. The Clerk of Courts read the indictment to the defendant at which time the Court explained to the defendant the nature of the charges against him, the penalties involved, and his rights under the Constitution and the laws of this State. The defendant then entered a plea of not guilty to all three counts contained in the indictment which said he is not guilty, and were accepted by the Court.

This case having been regularly set for trial on the 20th day of October, 1975, and a jury duly impaneled and sworn, and following the presentation of the evidence and the instruction of the Jury by the Court, a verdict of guilty as charged on each of the three counts of aggravated murder in violation of

Section 2903.01 and a verdict of guilty as charged to each of the specifications in all three counts in violation of Section 2929.04 (A) Subsection (5) of the Ohio Revised Code as contained in a copy of the verdicts attached hereto and made a part hereof, were returned by the jury this 21st day of October, 1975.

The Court following the reading of the verdicts reads said verdicts. Pursuant to Revised Code Section 2929.04 it is therefore ordered that the bailiff, Wayne Church, prepare a pre-sentence report and present the same in writing, to the Court. It is further ordered that Dr. Harold T. Brown of the Fairfield County Mental Health Clinic be appointed and ordered pursuant to Revised Code Section 2929.04 to make a psychiatric examination of the defendant and submit his report to the Court pursuant to Revised Code Section 2947.06. It is further ordered that copies of the report shall be furnished to the Prosecutor and to the defendant and his respective counsel.

Following the completion of said pre-sentence report and the presentation of the same to the Court this matter shall then be set down for further proceedings according to law.

MERLIN C. PARENT--JUDGE

APPROVED BY:

John L. Martin
Prosecuting Attorney

James W. Luse
Assistant Prosecuting Attorney

J. Gene Jackson
Counsel for Defendant

John J. Charles
Counsel for Defendant

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APPELLEE'S APPENDIX "B"

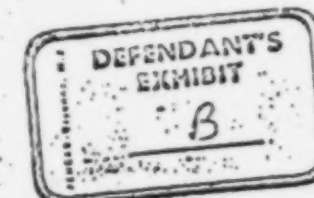
COURT OF COMMON PLEAS
FAIRFIELD COUNTY
LANCASTER, OHIO
43130

MERLIN C. PARENT
JUDGE
TELEPHONE 654-6530
AREA CODE 614

E. RAYMOND MOREHART
JUDGE
TELEPHONE 654-0510
AREA CODE 614

November 6, 1975

Dr. Harold T. Brown
Psychiatrist-Director
Fairfield County Clinic for
Guidance and Mental Health
201 S. Broad Street
Lancaster, Ohio 43130



Re: Charles Edward Downs

Dear Dr. Brown:

Charles Edward Downs has been convicted of three counts of aggravated murder. The penalty is death unless the defense or a psychiatric examination shows mitigating circumstances. If such mitigating circumstances exist the penalty is life imprisonment on each of the three counts.

Consequently, we are requesting that you and your staff make a thorough examination of the defendant and render a detailed and complete report to the Court showing your findings, evaluations and recommendations. A Court order is attached hereto authorizing you to make such examination and make your report to the Court. The law, also, provides that a photostatic copy be served upon the defendant by the Court.

The victims, Steven Richard Bailey, Connie S. Hodgman and her 7 year old daughter, Tracey Hodgman, resided in a three room house located in the center of a dense thicket in southern Fairfield County. A one way lane (approximately a mile long through the thicket) led to the house. Another path (hardly discernible) lead from the cabin to a highway in the opposite direction from the lane.

All three victims were shot three times with a 16 gauge shotgun, the final shot in each case being fired at extremely short range. The woman had been stabbed several times in and about the neck. The man and woman were found out in the yard near their motor vehicle 30 or 40 feet from the house. The little girl was found under one of the beds in a bedroom where she was partially covered with a mattress and another cover of some sort.

Testimony at the trial indicated that Steven Bailey, the defendant and a number of other people who testified at the trial were engaged in the illegal purchase, sale and use of marijuana. The defendant and another party had given Steven Bailey \$400.00 (approximately) to purchase marijuana a few weeks before the murders. Bailey returned without either the marijuana or the

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November 6, 1975

money. His story was that he thought that he was being followed and had to throw it out of the car window. Testimony was presented that it was a "rip-off" and that the defendant suspected that such was the case.

The testimony further indicated that on the day of the murders that Mr. Downs, Ronald Byers and the defendant's twenty year old girl friend (who was living with him at the time) went into southern Fairfield County to examine and/or service his marijuana patches. After examining the second patch the defendant indicated that his marijuana patch or patches had been "ripped off" and he suspected Bailey of being the culprit. The testimony indicated that he threatened to kill Bailey and that he said he really did not want to kill Connie Hodgman and her daughter but that it would be necessary to do so as they would be witnesses to the killing of Steven Bailey. The testimony further indicates that they then returned to his home at 235 Maude Avenue where they got his 16 gauge shotgun and a box of shotgun shells. The three of them went to a remote spot where the defendant took the gun, some shells and a hunting knife and told Byers to pick him up in a couple of hours. Byers allegedly picked him up as instructed but the defendant's girl friend was not along on this trip.

During the two weeks trial the defendant showed little or no emotion. He did not testify in his own defense.

Charles Edward Downs was born on November 6, 1944. He was unmarried although Virginia Browning, age 20, was living with him. Virginia Browning is an epileptic and has been advised not to drink or smoke pot but she persists in doing both. Marijuana parties apparently were not unusual with them and their friends.

The defendant dropped out of Amanda Clearcreek School during his sophomore year. He has worked at many jobs. At the time the crimes were committed he was employed at the Loroco Paper Mill where he operated rather intricate automatic machinery.

The defendant has been a resident of Fairfield County for the past 16 years. Prior to that time he lived in Hocking and Pickaway Counties. His brother, Robert Lee Downs, was convicted of murder of an elderly man 21 years ago in Hocking County. The story is that it was committed for money but that only between 25¢ and 30¢ was obtained. The brother was just recently released from prison because of that offense.

Mr. Downs now claims that since his apprehension (and prior to that time) he accepted God and is now a christian, his preference of church being the Church of Christ. Mr. Downs comes from a family of 5 boys and 6 girls. His father is deceased and his mother lives in Stoutsville, Ohio with one of her daughters.

The defendant insists that the death sentence be imposed because he does not want to spend the balance of his life in the penitentiary.

Charles Edward Downs has an extensive criminal record, some of which are

November 6, 1975

as follows:

1-8-66 charged with strong armed robbery, given probation on unarmed robbery;

10-28-67, sent to Ohio Penitentiary for parole violation. (assault and battery and resisting arrest), sentenced 1-25 years;

10-21-69 paroled from Lebanon Correctional Institution;

8-6-71 charged with contributing to the delinquency of a minor. Case dismissed in Pickaway County Juvenile Court;

9-15-71 charged with breaking and entering in the night season. Jury found him guilty of both counts on 3-7-72. He was sentenced to 1-15 and 1-7 to be served concurrently;

3-22-73 he was paroled from London Correctional Institution.

I trust that this will give you sufficient information to proceed with your examination.

Respectfully submitted,

Merlin E. [Signature]

MCP:lc

Enc. Court order

Court of Common Pleas, Fairfield County, Ohio

September Term, A. D. 1975

THE STATE OF OHIO

vs.

Charles Edward Downs

Indictment for

Aggravated Murder (3 counts)

No. 7606

We, the Jury in this Case, being duly impaneled and sworn to well and truly

try and true deliverance make between the State of Ohio and the defendant

Charles Edward Downs, find the defendant, Charles Edward Downs Guilty
Guilty - Not Guilty

of Aggravated Murder in violation of Section 2903.01 of the Revised Code of the

State of Ohio as he stands charged in the First Count of the Indictment and,

further find the the defendant, Charles Edward Downs, Guilty
Guilty - Not Guilty

of Aggravated Murder in violation of Section 2903.01 of the Revised Code of the

State of Ohio as he stands charged in the Second Count of the Indictment and,
further find the defendant, Charles Edward Downs, Guilty
Guilty - Not Guilty

of Aggravated Murder in violation of Section 2903.01 of the Revised Code of the

State of Ohio as he stands charged in the Third Count of the Indictment.

And, we do so render our verdict upon the concurrence of twelve members

of said Jury. Each of us said jurors concurring in said verdict signs his/her

name hereto this 31 day of Oct. 1975.

1 Charles J. Sizer 7 John R. Hoffman
2 Judy M. Hill 8 Wayne B. Bowers
3 Calvin L. Poling 9 Bernard M. Cuccia
4 Will M. Bair 10 Wilbur L. C.

Court of Common Pleas, Fairfield County, Ohio

September Term, A. D. 1975

THE STATE OF OHIO

vs.

Charles Edward Downs

Indictment for

Aggravated Murder (3 Counts)

R. C. 2903.01

No. 7606

We, the Jury, find the defendant, Charles Edward Downs Guilty
Guilty - Not Guilty

of the following specification: The offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender; as he stands charged in the First Count of the Indictment.

We, further find the defendant, Charles Edward Downs Guilty
Guilty - Not Guilty

We, further find the defendant, Charles Edward Downs Guilty
Guilty - Not Guilty

And we do so render our verdict upon the concurrence of twelve members of said Jury. Each of us said jurors concurring in said verdict signs his/her name hereto this 31 day of Oct 1975.

1 Charles J. Sizer 7 John R. Hoffman
2 Judy M. Hill 8 Wayne B. Bowers
3 Calvin L. Poling 9 Bernard M. Cuccia

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-

examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v H 511. EN 1-1-74.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

HISTORY: 134 v H 511. EN 1-1-74.

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